STATE OF MICHIGAN

COURT OF APPEALS

BRET D. HAWKINS and ERIN HAWKINS,

Plaintiffs-Appellants,

v

RANCH RUDOLPH, INC., and CIRCLE H STABLES, INC.,

Defendants-Appellees.

UNPUBLISHED
September 27, 2005

No. 254771
Grand Traverse Circuit Court
LC No. 03-022735-NO

Before: Meter, P.J., and Murray and Schuette, JJ.

MURRAY, J. (*dissenting*).

With great respect to my esteemed colleagues, I dissent from their decision to reverse the trial court's grant of defendants' motion for summary disposition.

As the majority correctly observes, in reviewing the propriety of granting defendants' motion under MCR 2.116(C)(10), we, like the trial court, must view the admissible evidence in a light most favorable to plaintiffs, the non-moving parties. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). With the material facts viewed in that manner, we must then determine whether reasonable minds could differ as to whether the conduct at issue was so reckless as to demonstrate a substantial lack of concern for whether an injury would result. *Xu v Gay*, 257 Mich App 263, 270-271; 668 NW2d 166 (2003).

Where I depart from my colleagues is my conclusion that this evidence, under this standard, does not arise to the recklessness required to establish gross negligence. The material facts, viewed in a light most favorable to plaintiffs, established that the following events occurred at Ranch Rudolph:

1. Plaintiff Bret Hawkins (hereafter "plaintiff"), signed the waiver of liability, and informed the trail guide that he had never ridden a horse;

2. In response, the trail guide put plaintiff on the most cautious horse available, one usually utilized with children;

3. Once atop the horse, plaintiff informed the trail guide that his saddle was loose. The trail guide responded by attempting to tighten the saddle;

4. Before commencing the ride, the trail guide visually and orally instructed all the participants as to how to properly ride and handle the horse;

5. Once the trail ride commenced, the guide and all riders proceeded "extremely slow";

6. Eventually, the trail guide asked the riders if they wanted to "go a little faster," to which the group responded "yes";

7. Before picking up the pace, the trail guide told the riders that they should yell if anyone wanted to slow down;

8. The trail guide, and all other horses, started on a "high speed run," and less than a minute later, plaintiff was injured.

These material facts, taken from plaintiffs' affidavits, answers to interrogatories and photos, do not establish that the trail guide acted so recklessly that she exhibited a substantial lack of concern for whether an injury would result. Rather, the evidence shows that, in response to plaintiff's concerns, she (1) placed him on the safest possible horse; (2) attempted to further tighten the saddle; (3) instructed the riders on safety and riding procedures; (4) started the ride off "extremely slow;" and (5) sped up only after the riders – including plaintiffs – agreed to do so. Hence, the act at issue[1] was the trail guide's decision to go too fast for plaintiff to handle, but not all the others, including his wife, who last rode a horse at age eleven. This misjudgment may have been a negligent one, but it did not reveal a recklessness with regard to plaintiff's safety. *Maiden, supra* at 122-123 (ordinary negligence does not amount to gross negligence). All the evidence of precautions taken, in fact, precludes reasonable jurors from so concluding. See, e.g., *Lindberg v Livonia Public Schools*, 219 Mich App 364, 368-369; 556 NW2d 509 (1996).[2]

I would affirm the trial court's order.

/s/ Christopher M. Murray

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[1] Plaintiff also complains about the trail guide's inability to properly tighten the saddle. However, in my view, this is no more than an allegation of negligence, because there is no dispute that the trail guide attempted to tighten the saddle, but at best was unsuccessful in doing so.

[2] As the trial court correctly observed, there seems to be a varying degree of decisions under this standard of liability. In my view, this results not from any inconsistency in determining the standard itself, but instead arises from the natural difference resulting from each judge's own objective determination of whether the evidence meets that standard. Because judges do not always agree on the legal impact of the same undisputed set of facts, our decisions will at times necessarily result in different opinions.